92-1235

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DONALD O. MAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether The District Court Correctly And Adequately Instructed The Jury On The Essential Elements Of A Violation Of The Hobbs Act, 18 U.S.C. §1951.

II. Whether The District Court's *Allen* Charge, Given After The Jury Had Twice Indicated A Deadlock, Was Impermissibly Coercive.

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD O. MAY,	*	
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Petitioner,	*	
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v.	*	No. _____
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UNITED STATES OF AMERICA,	*	
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Respondent	*	
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, Donald O. May, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *United States v. Donald O. May*, ___ F.2d ___, No. 91-9026 (11th Cir. 1992).

On January 11, 1992, Donald May filed in this Court an application for release pending certiorari to the United States Court of Appeals for the Eleventh Circuit and/or, in the alternative, application to recall and stay the mandate of the United States

Court of Appeals for the Eleventh Circuit pending certiorari. This is Application No. 92-536.

OPINION BELOW

The unpublished opinion of the Court of Appeals entered on November 16, 1992 is Appendix A.

JURISDICTION

Donald O. May was indicted and convicted for an offense under 18 U.S.C. §1951 (The Hobbs Act). His conviction was affirmed by the United States Court of Appeals for the Eleventh Circuit on November 16, 1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

TEXT OF STATUTE INVOLVED

18 U.S.C. §1951 (The Hobbs Act)

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to nay person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commence between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

STATEMENT OF THE CASE

(i) Course of Proceedings

Donald O. May was indicted in the district court on November 14, 1990 on two counts of violation of the Hobbs Act, 18 U.S.C. §1951. R1-1.[1] After the litigation of a motion to dismiss based upon the Supreme Court's decision in McCormick v. United States, 500 U.S. ____, 111 S.Ct. 1807 (1991), R1-19, and motion to dismiss and updates based upon prosecutorial misconduct, R1-19, 24, 30, jury trial began on the afternoon of July 9, 1991, with testimony beginning on the afternoon of July 10.

After five (5) days of evidence, the case was submitted to the jury on July 17, 1991. The jury deliberated for three (3) days, twice requesting reinstruction, once inquiring about how to deal with an inability to reach a unanimous verdict, subsequently announcing a deadlock, and receiving an Allen charge, before arriving at a verdict in the late afternoon of Friday, July 19, 1991. The jury found Donald May not guilty of Count 1 and guilty of Count 2 of the indictment. R2-42, 43.

On November 12, 1991, Donald May was sentenced to ten (10) months imprisonment, a three (3) year term of supervised release after his release from imprisonment, a fine of twenty thousand dollars ($20,000.00), and a special assessment of fifty dollars ($50.00). R2-45.

A timely notice of appeal was filed on November 15, 1991. R2-46. The United States Court of Appeals for the Eleventh

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[1] The designations in this petition are to the record in the United States Court of Appeals for the Eleventh Circuit.

Circuit affirmed the decision per curiam pursuant to circuit Rule 36.1 on November 16, 1992.

(ii) Statement of Facts

Don May was charged with two counts of extortion under the Hobbs Act. In an obvious compromise verdict, *see* pp. 28-33, *infra*, he was acquitted of one count and convicted of the other.

Don May resided in Spalding County where he earned a living as a licensed real estate broker and real estate consultant. As part of his work, he managed properties for others on a small scale. R8-1050, 1051.

In 1987, Don May was asked by a member of the Spalding County, Georgia Board of County Commissioners (hereafter "County Commission") to accept an appointment to the Spalding County Board of Appeals (hereafter "Board of Appeals") R8-1053. The Board of Appeals is a seven member board of citizens from all walks of life. R7-988, 1017-19. Service on the Board of Appeals is an essentially unpaid position; each member is compensated ten dollars ($10.00) per meeting. The Board of Appeals generally meets one evening per month, after work hours. R7-1018. Payment essentially reimburses board members for expenses incurred in travelling to view land when zoning issues are brought before the board. Members of the Board of Appeals are citizen volunteers and are not expected to give up or curtail their regular employment, which of course would be financially impossible. R7-1018, 1019.

In 1989, the County Commission also asked Don May to serve on the Spalding County Planning Commission [hereafter "Planning Commission"). R8-1057. Don May began to serve on the Planning Commission in January, 1990. His understanding was that he would resign from the Board of Appeals, but the County

Commission asked him to remain on the Board of Appeals until a replacement was found. On three or four occasions, Don May asked the County Commission to find a replacement, as serving on both boards was too time-consuming; the County Commission again asked him to stay until a replacement could be found. R8-1062-1064.

The Planning Commission, like the Board of Appeals, was an essentially unpaid body of citizen volunteers. Each Planning Commission member was again paid ten dollars ($10.00) per meeting and generally met one evening per month. R7-981-984; R8-1018.

The members of the Board of Appeals and Planning Commission, all lay citizens, received absolutely no guidance on how they were to perform their tasks, given no oath of office, and given no instruction from the county attorney or anyone else concerning the legal parameters of their duties. R7-979; R8-1054, 1057.

One of the primary duties of the Board of Appeals was to make decisions concerning variances from existing zoning regulations of Spalding County. R8-1055, 1056; Def.'s Ex. 26 at 8-18.15, 18.16. The primary duties of the Planning Commission were to make recommendations concerning rezoning of property to another zoning classification existing under Spalding County regulations, and to recommend the establishment of new zoning districts in Spalding County. R8-1058; Def.'s Ex. 26 at 8-3, 4, 5.

The Planning Commission could not, on its own, rezone property or establish new zoning districts. A decision by the Planning Commission to deny a request for rezoning is binding. However, a decision by the Planning Commission to grant rezoning or establish a new zoning district is merely a recommendation to the elected County Commission which has the final decision making authority. If an application was not acted upon by the

Planning Commission within sixty (60) days, then the County Commission could consider it directly. Def.'s Ex. 26 at 8-3, 4, 5. Any adverse decision by either the Board of Appeals or the Planning Commission is subject to review by the Superior Court of Spalding County. Id. at 8-4, 8-18.17. Don May was charged in Count One of the indictment with extorting William Landrum and Carlton (Cotton) Morris, and in Count Two of the indictment, with extorting Gerald Lawhorn. R1-1. The Government tries to portray these two counts as two independent and wholly unrelated events. The uncontested facts are to the contrary.

This case began as a State investigation initiated by the District Attorney for the Griffin Judicial Circuit, State of Georgia.

William Landrum (the alleged victim of Count One) and Gerald Lawhorn (the alleged victim of Count Two) were partners in business ventures who have known each other and engaged in business transactions together for over twenty (20) years. R5-675, 676; R7-883. Both were represented by a politically powerful attorney, Drew Whalen, who, in each case, contacted the District Attorney for the Griffin Judicial Circuit to investigate. Even Cotton Morris, one of the Government's alleged victims, is heard in a Government tape recording, stating that Drew Whalen and the Spalding County Attorney, "sleep in the bed together." Govt.'s Ex. 3-T at 36; R5-647. The County Attorney is the former law partner of the District Attorney for the Griffin Judicial Circuit. R5-645. Drew Whalen was and remains the City Attorney for Griffin and is the son of the Chief Superior Court Judge for the Griffin Circuit.

Gerald Lawhorn is the owner of OK Oil, a fifty million dollar ($50,000,000.00) a year business, as well as a shooting resort, a packaging business with William Landrum and Cotton Morris, and other business interests. R7-871, 872, 882, 883. William Landrum, in addition to his business interests with

Lawhorn, is a major land developer in Spalding County with Cotton Morris, and owner of other business interests. R5-593, 675, 676.

In 1987, Landrum and Morris, Inc. purchased a piece of property on Highway 92 in Griffin, Spalding County, Georgia for $44,000.00. R5-587. According to Landrum, the property was initially bought as an investment and later, in 1988, they determined to develop the property by building duplexes. R5-527. The zoning regulations of Spalding County allowed only one residential unit per acre; however, Landrum and Morris wanted to develop this property with duplexes built at a density of four units, eight apartments per acre. *Id.* at 528.

Before seeking this variance with the Board of Appeals, Landrum asked Dan Dunson, a person for whom Don May was working, to introduce Landrum to Don May. Don May met with Landrum and drove with him to inspect the Highway 92 property that Landrum and Morris sought to develop. R7-1033; R8-1064, 1065. Although this was not required by his duties as a member of the Board of Appeals, Don May voluntarily did so, and sought no compensation from Landrum and Morris. *Id.* at 1076, 1077.

Landrum and Morris' petition for a zoning variance to allow the construction of four units per acre on the Highway 92 property was approved unanimously by the Board of Appeals on May 12, 1988 with the provision -- agreed to by Landrum and Morris -- that ten (10) requirements be met. R5-608; Def.'s Ex. 24.

Under the regulations of Spalding County, this zoning variance if not complied with in one year, would expire. Def.'s Ex. 26 at 8-18.16. Within the one year period, Landrum and Morris were required to submit site plans for the approval of the Board of Appeals demonstrating compliance with the ten (10) requirements placed on the variance. This approval was not a

discretionary act with the Board of Appeals: if the site plans showed compliance with the ten requirements, approval must be given; if the site plans did not show compliance, approval could not be given. R7-1022-1023.

In 1989, Landrum and Morris petitioned the Board of Appeals for a one year extension on the previously granted variance. Def.'s Ex. 27. The extension was unanimously granted on June 8, 1989.

In early 1990, Landrum and Morris still had not submitted site plans demonstrating compliance with the ten requirements of the zoning variance. Instead, Landrum and Morris petitioned the Planning Commission to rezone the Highway 92 property to C-1 (commercial) with the intent to build mini-warehouses on this property in a residential area. R5-531-532. Sixty-five (65) citizens, persons in the neighborhood of the Highway 92 property, petitioned the Planning Commission to deny the rezoning request. Def.'s Ex. 29.

The Planning Commission voted unanimously to deny the rezoning request. R5-534; Def.'s Ex. 29. This vote angered Landrum and, without any supporting evidence or basis, he blamed Don May. In fact, Landrum blamed Don May for several acts of the Board of Appeals and Planning Commission which were adverse to Landrum's business interests or the interests of his business associates. R5-542, 633-638. However, when questioned specifically, Landrum did not even know how Don May had voted. *Id.* at 639.

Both Landrum, and later, Gerald Lawhorn, testified that they believed that Don May controlled the Planning Commission and Board of Appeals. R5-542; R6-795. However, they could not state any basis whatsoever for this belief. All of the members of the Board of Appeals and Planning Commission who testified at trial ridiculed this notion; not only did Don May not "control"

them, he never once even tried to influence anyone's vote. R7-982-983, 994, 1023; R8-1262.

During 1990, Landrum and Morris signed an option for an Alabama investor to purchase the Highway 92 property. The Alabama investor signed an option to purchase the property from Landrum and Morris for two hundred thousand dollars ($200,000.00) only if the variance was intact.

Cotton Morris set up a meeting between himself and some out of town developers on the one hand and Carlton White, the chair of the Board of Appeals, on the other hand. Carlton White asked Don May to attend the meeting with him; as a favor to Mr. White, Don May agreed. R7-1019-1020; R8-1077-1078. At the meeting, Cotton Morris was abusive and stated that he would develop the property any way he and Landrum wanted, irrespective of the ten requirements placed on the variance. Carlton White and Don May walked out of the meeting with Don May telling Morris not to call again unless he had complied with the ten requirements of the zoning variance. R7-1022; R8-1080.[2]

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[2] The facts of this meeting were confirmed, to the extent permitted by the evidentiary rulings of the district court, by Carlton White, a disinterested witness whom the Government has never alleged or even hinted to be acting in concert with or protecting Don May. The Government chose not to call its alleged victim, Cotton Morris, as a witness.

In late April, 1990, Don May received a call from Drew Whalen,[3] who asked Don May to meet with Landrum concerning the variance on the Highway 92 property that was due to expire.

Don May reluctantly agreed. According to Don May's testimony, at that meeting Landrum sought Don May's help in getting his site plans developed to show compliance with the ten requirements of the zoning variance. Don May told Landrum that he was tired of assisting him for free and that if Landrum wanted to hire him as a consultant he could help prepare the site plans. Id. at 1090-1091.

According to Landrum's testimony, Don May said that Landrum had the wrong people working on the project and that he (Don May) did that kind of work for a living. Landrum testified that he interpreted this as an attempt by Don May to sell his "vote" on the Board of Appeals. R5-540-542.

Both Landrum and Don May agreed that the meeting ended with Landrum deciding not to hire Don May, R5-631-632; R8-1092; Don May thought at the time that was the end of it.

Landrum testified that he ultimately contacted Drew Whalen, who contacted the state District Attorney for the Griffin Judicial Circuit. R5-544-545. The district attorney began an investigation and also used investigators from the Georgia Bureau of Investigation [GBI]. A series of meetings between Landrum and Don May were tape recorded without Don May's knowledge. Also, a tape recording device was placed on Landrum's home telephone where Landrum could record those calls that he chose to

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[3] Despite the Government's promise in its opening statement to the jury to call Drew Whalen as a witness, R15-36, and, despite the fact that Drew Whalen was prominent in both Landrum's and Lawhorn's testimony, the Government chose not to call Drew Whalen as a witness.

record; he could also turn the device off so that not all of his calls were recorded. R14-117.

The first recorded meeting between Don May and Landrum occurred at the restaurant at the Griffin Holiday Inn on April 25, 1990. R5-546-548. Don May and Landrum met for coffee at a table near a window in the middle of a crowded public restaurant. R8-1093-1094.

Soon after this meeting Agent Doug Carter of the GBI listened to the tape of the meeting, [4] and, at the insistence of the district attorney, called Landrum at home. Landrum recorded this conversation with Agent Carter. Another meeting with Don May had been set up for that evening. Agent Carter, discussing with Landrum the recorded meeting which had occurred between Landrum and Don May that morning, frankly told Landrum that there was not enough evidence and told Landrum to try to get Don May to talk about vote buying. Def.'s Ex. 11 at 13, 15. Carter said, ". . . I know this. You've got to get the — use the count on your vote in there . . . we haven't – I mean without it, we basically don't have anything anyway." *Id.* at 15.

Then the following incredible exchange occurred between Agent Carter and Landrum about trying to get Don May to take a payment outside of Spalding County:

> "[Doug Carter]: Well if we have to pay him [Don May] in the morning, let's get him in Fayette County to pay him * * * I mean, if everything goes okay, and we try to prosecute him, there's not much good – there's not a good shot at it down there [in Spalding County] * * * And so,

[4] The GBI agents routinely listened to tapes of the meetings between Landrum and Don May shortly after they were made. R14-160, 169, 173.

we're wasting our time, your time, my time, DA's time.

[Bill Landrum]: Yeah. It's going to be hard to get him across that line, though, get him up there [Fayette County] * * *

[Doug Carter]: You think of something in Fayette County that you're going to have to be up there
* * *
You know, if he balks, he balks, but you've got to give it your best shot because that's important. It really is.
* * *

[Bill Landrum]: But you don't think we can do it here in this town, this county [Spalding]?

[Doug Carter]: Well, you can, but your chances -- our chances of -- If something comes of it, the chances of getting a conviction down there [Spalding County] are slim -- are not near as good as if you got him in Fayette County." Id. at 17-19.[5]

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[5] It takes little speculation to surmise, by one who has even the slightest knowledge of the reputations of the Government's witnesses, the reasons the district attorney was unwilling to prosecute this case in Spalding County. It was as easy to conceal the reputation of the government's witnesses in the United States District Court below as it would have been in Fayette County, in a distant county from their residences..

The meeting between Don May and Landrum at Landrum's home on the evening of April 25, 1990 was the critical meeting where Don May would review his consulting contract with Landrum. Agent Carter and the district attorney realized the importance of this meeting and made arrangements for Landrum to pick up a tape recorder to tape the meeting. Def.'s Ex. 11 at 3-5, 9.

At this meeting, Don May reviewed in detail the consulting contract he ultimately entered into with Landrum. The contract, Govt.'s Ex. 7, specifically pointed out that Don May was being hired to review and prepare site plans for Landrum's project. The duties contemplated by this contract were necessarily the type of duties Don May would be expected to perform in his regular profession as a real estate consultant. The contract disclosed that Don May was a member of the Board of Appeals and stated that the contract was not conditioned upon Landrum and Morris receiving a favorable response from Spalding County Government. The contract specifically set a termination date of May 9, 1990, prior to the Board of Appeals meeting set for May 10. The contract was in writing and Landrum received a copy that he could show to anyone.

Landrum's payments to Don May under the contract were made by two checks, not cash: one for one thousand dollars ($1,000.00) as a retainer and one for twenty five hundred dollars ($2,500.00), Govt.'s Ex. 8, 10; R5-562-563, 573, when Don May fulfilled the contract by working with the engineers to prepare the completed site plans which met the ten requirements of the zoning variance. Don May took both checks to his local bank in the small community of Griffin, Spalding County, Georgia and presented his driver's license as identification. R8-1110, 1122. Don May also reported this income as a consultant fee on his income tax return. *Id.* at 1122.

The existence of the tape recording of the meeting between Don May and Landrum on the April 25, 1990 tape was not made known to counsel for Donald May until after Don May filed a motion to dismiss for prosecutorial misconduct based in part on missing tapes. R1-19. Only then, on July 1, 1991, one week before trial, did the Government announce the existence of the tape, and announce that it was "blank". R13-29.

At least two (2) other conversations between Landrum and Don May were recorded without the knowledge of Don May. In neither of these conversations was vote buying mentioned, in neither conversation did Don May threaten any adverse consequences if he was not employed by Landrum and Morris. Although Landrum testified that he felt he was being extorted by Don May and that he had not hired Don May for any purpose, he could not explain why the tapes were filled with all this discussion about working with the engineers on site plans and getting the site plans right. R6-742-743.

At the hearing on May 10, 1990, the Board of Appeals exercised its non-discretionary function of reviewing the site plans, ascertaining that they complied with the ten requirements of the zoning variance and, as compelled by the zoning regulations of Spalding County, unanimously stated that the site plans met the requirements of the variance. Govt.'s Ex. 15; R5-580-581. Don May made no attempt to influence any member's decision.

Count Two of the indictment, of which Don May was convicted, alleged extortion of Gerald Lawhorn.

In addition to his business enterprises with Landrum and Morris, Gerald Lawhorn is the owner of OK Oil, a fifty million dollars ($50,000,000.00) a year business, Cherokee Rose Shooting Club, the resort which is the subject of this count of the indictment, and other business interests. R6-758, 871, 883. In 1989, Lawhorn was seeking to expand his Cherokee Rose Shooting

club *into* a resort area including a lodge, restaurant and sales of alcoholic beverages. R6-764-767. He was unsure of how to accomplish this resort concept under the Spalding County zoning regulations. *Id.*

Frank Harris, the Chair of the Planning Commission, who sold insurance to Lawhorn, introduced Lawhorn to Don May because of Don May's knowledge of zoning regulations. *Id.* at 766-767, 874. It was determined that there was no Spalding County zoning classification that would accommodate the project that Lawhorn envisioned with Cherokee Rose; a new zoning district needed to be drafted and enacted in Spalding County. *Id.*; R8-1123-1125.

Harris asked Don May if he would draft a new zoning district. Don May responded that such a task would require a tremendous amount of research and work and that this was not within his extremely limited duties as a member of the Planning Commission. R8-1126. Subsequently, Lawhorn and Harris approached Don May about drafting the new zoning district under a consulting contract with Lawhorn. Id. at 1126-1127.

Lawhorn and Don May agreed on a fee of five thousand dollars ($5,000.00) for Don May's consulting services. R6-766-768; R8-1129. Don May and Lawhorn entered into a consulting contract; this contract set out that the work was related to zoning requirements and classification for Cherokee Rose, disclosed Don May's membership on the Planning Commission and stated that the contract was not contingent upon Cherokee Rose receiving a favorable zoning. A termination date for the contract of May 15, 1989 was set. Def.'s Ex. 36.

Lawhorn testified that he believed this contract to be totally proper, that Don May was not trying to extort him, that he agreed on the price, and, that Don May fully completed the consulting job

for which he hired Don May -- to draft the new zoning district. R7-887-888.

Don May drafted the new zoning district called the "Planned Residential and Recreational Resort Development District" (PRRRD). At that point the contract was fulfilled and ended. R7-888; Def.'s Ex. 36.

The Planning Commission reviewed the PRRRD district and recommended to the elected County Commission that it be enacted into the zoning regulations of Spalding County. R8-1136. The elected County Commission voted to enact the PRRRD zoning district.

In the fall of 1989, Lawhorn then petitioned the Planning Commission to rezone the Cherokee Rose land as PRRRD. The Planning Commission recommended approval of this rezoning and the elected County Commission voted to rezone the Cherokee Rose land as PRRRD. *Id.* at 1143. At no time has Don May ever been a member of the elected County Commission.

Under the requirements of PRRRD as enacted by the elected County Commission, before construction could begin on the land zoned PRRRD, pre-development site plans showing compliance with the zoning regulations must be submitted for approval by the Planning Commission. At the end of May, 1990 Lawhorn still had not submitted the required pre-development site plans for his Cherokee Rose resort project. However, the site plans were not the only problems Lawhorn was having with Cherokee Rose. Lawhorn was trying to get an alcoholic beverages pouring license for Cherokee Rose, his shotgun trap-shooting venture.

It should be noted that the issuance of alcohol licenses in Spalding County is the sole and exclusive province of the elected County Commission. Neither the Planning Commission nor the Board of Appeals, of which Don May was a member, have

anything whatsoever to do with the issuance of alcohol licenses. Def.'s Ex. 37.

On June 11, 1990, Drew Whalen filed what he purported to be the predevelopment site plans, Def.'s Exs. 39, 40, with the county. R8-1144-1145. Drew Whalen delivered a copy of these site plans to Don May and asked that approval of the plans be placed on the agenda of the June 26, 1990 meeting of the Planning Commission. *Id.*

The June 26 meeting of the Planning Commission had already been set aside for hearing of rezoning matters. Also, the required advertising of public notice of the June 26 meeting, which had to be made at least fifteen days in advance had already been set in the newspaper. There was insufficient time to provide the required fifteen day notice of an amended agenda. *Id.* at 1145-1147.

After reviewing the purported site plans, Don May recognized that the submitted plans completely failed to meet the requirements of pre-development site plans under the PRRRD zoning regulations. R8-1150. Don May met with Drew Whalen at his office and pointed out the gross deficiency of the submitted plans; Drew Whalen responded that he had no intention of submitting any further plans. *Id.* at 1149.

Lawhorn testified that around June 18, 1990, he called Don May and told him he wanted to meet with him about Cherokee Rose. Lawhorn testified that at this meeting he laid the site plans out on the table; according to Lawhorn, Don May said he would not place the plans on the agenda for approval because "the plans were not right." R6-793. Lawhorn further testified that Don May said that the plans had to be worked on, that he was the only one qualified to work on the plans and that he was going to have to be paid. *Id.* at 796. No such purported threat is made by Don May

in any of the secretly tape recorded meetings between Lawhorn and Don May.

It is very interesting to contrast the trial testimony of Lawhorn on Friday, July 12, 1991 with his testimony when he returned after the weekend recess on Monday, July 15, 1991. On Friday, July 12, Lawhorn testified that the site plans that he submitted fully complied with the PRRRD requirements. R6-786, 796, 817-818. Lawhorn testified that in March, 1990, his engineer had already done the work on the pre-development site plans and that he then hired engineer Alfred Bolton to finalize the plans. Id. at 781.

In contrast, on Monday July 15, 1991, after being confronted with the evidence that the submitted site plans totally failed in virtually all respects to meet the PRRRD requirements, Lawhorn changed his testimony completely. On Monday, July 15, 1991, Lawhorn testified that he and his team had known that the plans did not meet the requirements of PRRRD and that they only wanted the plans placed on the agenda of the Planning Commission so that the commission could tell him what was wrong with them. R7-907-914. The Planning Commission members testified that they would not have put Lawhorn's submitted plans on the Planning Commission's agenda. *Id.* at 993, 1023. It was the developer's responsibility to bring a completed set of site plans before the Planning Commission for approval, not the commission's duty to do the plans for the developer. *Id.* at 996, 997.

After the June 19, 1990 meeting between Lawhorn and Don May it was apparent that – for whatever reason is believed – Don May was not going to place Lawhorn's inadequate purported site plans on the Planning Commission agenda for approval. Again, as with the case of Lawhorn's business associates Landrum and Morris, Drew Whalen contacted the District Attorney for the

Griffin Judicial Circuit, R6-803, and began an investigation. This time, the FBI secretly recorded meetings. By bringing federal authorities into the picture, the district attorney finally succeeded in his plan to get jurisdiction of the case out of Spalding County.

A series of three meetings between Don May and Lawhorn were secretly tape recorded. The tapes speak for themselves; again, Lawhorn could have asked any question or steered the conversation in any direction -- he clearly was baiting Don May. Nonetheless, at no time on any tape does Don May threaten any adverse consequences if Lawhorn does not employ him as consultant. The taped meetings occurred at Lawhorn's, not Don May's instance. R6-816; R7-921.

Don May testified that he believed the meetings with Lawhorn were discussions of Lawhorn employing Don May in essentially two area: 1) for Don May to do (as he did with Landrum) the leg work and to confer with engineers and whatever other work was necessary to prepare pre-development site plans to comply with the PRRRD requirements, R8-1238, 1241, 1247-1248; of course, contrary to the Government's position, this would require more than simply filling information on a site plan drawing. Since the development must ultimately be built in accordance with the site plans, R7-1015-1016, this would necessarily require a great deal of work to insure that site plans reflect a practical and viable plan for the construction to follow. Contrast Def.'s Exhibits 16-23, the Landrum and Morris Highway 92 site plans, with Def.'s Exhibits 39 and 40, Lawhorn's purported site plans; 2) Don May would meet with the ministers and others opposing the liquor license for Cherokee Rose to show them that it was a positive project for the community. R8-1155-1156. Both of these tasks were certainly within the expertise of a person, such as Don May, who spent his career in real estate matters.

At the final taped meeting between Lawhorn and Don May, they signed a contract substantially the same as the contract signed when Lawhorn hired Don May to draft the PRRRD zoning district, Govt.'s Ex. 11, – the contract which Lawhorn testified was proper. Don May was given a retainer on the contract price; again by check, not cash. R7-852. At the end of the meeting Don May was stopped by government agents and the written contract and check seized. Id. at 853.

As stated previously, after five (5) days of evidence, the jury deliberated for three (3) days. Twice the jury requested reinstruction on the elements of the Hobbs Act. R9-1392; R10-1407. Thus, on three separate occasions, the jury received erroneous instructions on the Hobbs Act.

During the first day of deliberations, the district court stated, "I always leave it up to the jury whether they keep deliberating tonight or whether they want to come back tomorrow." R9-1294. At the end of the second day of deliberations, the jury sought guidance on how to deal with an inability to reach a unanimous verdict. R10-1436. At this point, contrary to its previous statement that the jury always controls its time of deliberations, the district court stated to the jury, "There's a possibility that, if necessary, we will work late tomorrow [Friday] night. So at least make tentative arrangements so that if it's necessary that we not have to recess at this time at least." R10-1438. The seeds that the jury's weekend would be ruined if a verdict was not reached were planted.

On the third day of deliberations, Friday, July 19, 1991, the jury returned to unequivocally announce that a unanimous verdict could not be reached as to *either* count of the indictment. R11-1440. Rather than accept this announcement – the second from the jury concerning the inability to reach a unanimous verdict – and declare a mistrial, the district court gave an *Allen*

"dynamite" charge. R11-1441-1443. Only after their unequivocal announcement of deadlock was not accepted did the jury, at the end of the day of Friday, July 19, 1991, return a verdict of not guilty as to Count One and guilty as to Count Two. R11-1446.

REASONS FOR GRANTING THE WRIT

I.

The District Court Did Not Correctly And Adequately Instruct the Jury On The Essential Element Of A Violation Of The Hobbs Act, 18 U.S.C. §1951.

This Court has written extensively in *McCormick v. United States*, 500 U.S. ___, 111 S.Ct. 1807 (1991), and *Evans v. United States*, ___ U.S. ___, 112 S.Ct. 1881 (1992), to define the conduct deemed criminal under the Hobbs Act, 18 U.S.C. §1951.

The district court's jury charge in this case defines the activity of a Hobbs Act violation differently from the standard established in *McCormick*, differently than the standard established in *Evans* – and the instructions left the jury in such a quandary as to what activity constitutes a Hobbs Act violation that it was necessary for the jury to be instructed three times. After the instructions were three times repeated, the jury reached a verdict after the third day of deliberation late on Friday afternoon, just following the court's *Allen* charge.

The instruction to the jury is included in its entirety as Appendix B.

The problem with the court's instruction is most easily understood by dividing the court's charge on the Hobbs Act into three stages, as did the district court.

These three stages were: first, the non-inducement requirement; second, the *quid pro quo* requirement; and third, the interstate commerce requirement.

The problem with the court's charge focuses on Stage 2 -- the *quid pro quo* segment of the charge. However, to clearly understand the jury's confusion and the erroneous nature of the charge, one must first focus on Stage 1 of the charge.

Stage 1 begins with a detailed explanation in paragraph after paragraph as to why no inducement on the official's part is required. The jury clearly was instructed that inducement was not an element.

After the court had concluded the inducement area of explanation, it began describing the *quid pro quo* area of the charge. The court began explaining the "something" for "something." But, on page 1377 of the trial transcript at lines 18-23 (R10-1377, lines 18 to 23 / App. B, p. 9, lines 9-14), the court takes away the *quid pro quo* requirement of the Hobbs Act by charging to the jury, in this *quid pro quo* stage, that it is not necessary for the government to prove that the defendant as a public official affirmatively demanded or solicited a payment "in exchange for some specific exercise of power . . . ." The court repeated this part of the charge on two occasions, when the jury requested additional instruction. (R10-1399, line 21 to R10-1400, line 1 / App. B, p. 18, lines 18-23; R11-1417, lines 3-8 / App. B, p. 30, lines 21-26).

This is the exact point where the judge takes away *quid pro quo* as an element of a Hobbs Act violation.

There is no wonder as to why the jury had to be charged on so many occasions. Each juror knows as a matter of public

knowledge that the Hobbs Act without the *quid pro quo* requirement includes the conduct of every public official. How could all the lawyers that are members of the state legislature represent their many insurance company and public utility clients without this *quid pro quo* shield, or more realistically asked, without the friendship of the U.S. Attorney?

The District Court's taking away of the quid pro quo requirement adds the type of contradiction we often observed in the *Sandstrom v. Montana*, 442 U.S. 510 (1979) progeny jury instruction cases. Two correct lines of instruction do not correct one line of incorrect direction.

The Hobbs Act Should Be Revisited By This Court.

Counsel for Donald May became aware for the first time in reading the dissent of Justice Thomas in *Evans*, a decision some months after Donald May's trial, that the Department of Justice had established guidelines for the prosecution of Hobbs Act cases.

> Until now, the Justice Department, with good reason, has been extremely cautions in advancing the theory that official extortion contains no inducement requirement. 'Until the Supreme Court decides upon the validity of this type of conviction, prosecutorial discretion should be used to insure that any case which might reach that level of review is worthy of federal prosecution. Such restraint would require that only significant amounts of money and reasonably high levels of office should be involved.' See U.S. Dept. of Justice, United States Attorneys' Manual §9-131.180 (1984)(emphasis added).

Evans v. United States, ___ U.S. ___ 112 S.Ct. 1881, 1904 (1992).

If *Evans* did not meet the Department of Justice guidelines as indicated by Justice Thomas, Donald May's case makes a mockery of an attempt to have a guideline. Donald May's case was such an aberration of the guidelines that the guidelines should have been made available to counsel as part of the *Brady v. Maryland*, 373 U.S 83 (1963) disclosures; they were not. The point is that this loosely defined conduct must at some point in time be restricted by a precise, informative instruction to the triers of fact.

This case, as much as any that could be imagined, demonstrates the need for an instruction that clearly defines the conduct that constitutes a violation.

In this case the local power broker, Drew Whalen, the lawyer-son of the Superior Court Judge, represented the "victim." This power broker convinced the district attorney to target Donald May, who was doing consulting work for Drew Whalen's client. Without question, there was professional jealousy by Drew Whalen for the work done and proposed by Don May.

Donald May was a member of the Board of Appeals and Planning Commission. The members of these boards were all lay citizens, received absolutely no guidance on how they were to perform their tasks, given no oath of office, and given no instruction from the county attorney or anyone else concerning the legal parameters of their duties. R7-979; R8-1054; 1057. Certainly, easy prey for a power broker lawyer.

This case was sent to the U.S. Attorney's office because, as indicated below from the government's own tapes -- the people of Spalding County would not convict on the word of this band of political rogues.

"[Doug Carter]: Well if we have to pay him [Don May] in the morning, let's get him in Fayette County to pay him * * * I mean, if everything goes okay, and we try to prosecute him, there's not much good -- there's not a good shot at it down there [in Spalding County] * * * And so, we're wasting our time, your time, my time, DA's time.

* * *

"[Bill Landrum]: But you don't think we can do it here in this town, this county [Spalding]?

[Doug Carter]: Well, you can, but your chances -- our chances of -- If something comes of it, the chances of getting a conviction down there [Spalding County] are slim -- are not near as good as if you got him in Fayette County." Def.'s Ex. 11 at 19.

The political motivations for bringing this case in federal court to obtain a conviction are enhanced by the use of an open ended statute as charged to the jury in this case.

There is a statute under Georgia law which could have been used if the State had though the conduct of Donald O. May was criminal. The Georgia statute is as follows:

O.C.G.A. §16-10-5. Influencing of officer or employee of state or political subdivision by another officer or employee.

> (a) Any officer or employee of the state or any agency thereof who asks for or receives anything of value to which he is not entitled in return for an agreement to influence or attempt to influence official action by any other officer or employee of the state or any agency thereof shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.
>
> (b) Any officer or employee of a political subdivision who asks for or receives anything of value to which he is not entitled in return for an agreement to influence or attempt to influence official action by any other officer or employee of that political subdivision shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.

The instruction to the jury in this case presents the type of misdirection of which Justices Thomas, Scalia and Chief Justice Rehnquist warned in *Evans*. Equally important, this case offers the appropriate opportunity for the *quid pro quo* analysis that Justices Kennedy and O'Connor wanted in *Evans*. In reality, even the author of *Evans* could not accept this district court's tangled words and misdirection.

These instructions were given three times to the jury which twice begged for reinstruction. The jury received only the same tangled charge until late Friday afternoon, when the instruction to the jury worsened. The jury announced it was deadlocked; then, the jury was given the "*Allen*" dynamite charge to pressure a decision. It was only then that the jury returned a split verdict of

guilty on one count of the indictment and not guilty on the other count.

II.
The *Allen* Charge Given By The District Court After The Jury Had Twice Indicated A Deadlock Was Impermissibly Coercive.

After hearing evidence for five (5) days, the jury deliberated for three (3) days before reaching its verdict at the end of the day on Friday. Twice, the jury requested and received further instructions by the district court. R9-1392, 1396; R10-1407.

At the end of the second day of deliberations, the jury requested guidance on how to proceed if a unanimous verdict could not be reached. R10-1436. At this time, the district court planted the seeds of coercion. Although during the first day of deliberations, the district court stated, "I always leave it up to the jury whether they keep deliberating tonight [sic] or whether they want to come back tomorrow," R9-1294, when the jury requested guidance at the end of the second day concerning how to deal with an inability to reach a unanimous verdict, the district court, contrary to its prior statement, told the jury, "[t]here's a possibility that, *if necessary*, we will work late tomorrow [Friday] night. So at least make tentative arrangements so that if it's necessary that we not have to recess at this time at least." R10-1438 (emphasis added).

During the third day of deliberations, Friday, July 19, the jury returned to unequivocally announce that a unanimous verdict could not be reached as to *either* count of the indictment. R11-

1440. After this *second* announcement of deadlock, the district court, over objections of Don May, R11-1441, read the modified *Allen v. United States*, 164 U.S. 492 (1896) "dynamite" charge. R11-1441-1443.

> THE COURT: All right. Ladies and gentlemen of the jury, I'm going to ask that you continue your deliberations in an effort to reach an agreement upon a verdict and dispose of this case, and I have a few additional comments that I would like for you to consider as you do so.
>
> This is, as I am sure you realize, an important case. The trial has been expensive and time, effort, money, and emotional strain to both the defense and the prosecution. If you should fail to agree upon a verdict the case will be left open and may have to be tried again. Obviously another trial would only serve to increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.
>
> Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced.

If a substantial majority of your number are in favor of conviction, those of you who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again and host thoughtfully whether you should accept the weight and the sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember that at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence, but after a full deliberation and consideration of the evidence in this case it is your duty to agree upon a verdict if you can do so.

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty. You may be as leisurely in your deliberations as the occasion may require, and you should take all the time which you may feel is necessary.

I now ask you to retire once again and continue your deliberations with these additional comments in mind, to be applied of course in conjunction with all the other instructions I have

previously given you. You may retire again at this time.

The district court, at the time of giving the *Allen* charge, rejected Don May's additional request, R11-1444, that the district court re-instruct the jury on the portion of the district court's original instruction which even-handedly directed the jurors as to how they should deliberate. This requested charge did not inject economic and cost considerations as did the *Allen* charge given by the court.

The rejected request to charge was as follows:

> Now, ladies and gentlemen, any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, in order to return a verdict you must all agree thereto. Your deliberations will be secret and you will never have to explain your verdict to anyone.
>
> Now, it is your duty as jurors to discuss this case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to reexamine your own opinion and to change your mind if you become convinced that you were wrong; but do not give up your honest belief solely because the others think differently or merely to get the case over with. Remember that in a very real way, you are the

judges, the judges of the facts, and your only interest is to seek the truth from the evidence in the case.

R9-1382-1383.

The district court also rejected Don May's request that the jury be instructed that if they could not reach a verdict, they could return and so inform the court. R11-1444.

Only after their unequivocal announcement of a deadlock on both counts of the indictment was not accepted did the jury, at the end of the day of Friday, July 19, return an obvious compromise verdict of not guilty as to Count One and guilty as to Count Two. R11-1446.

The Eleventh Circuit has authorized the use of a modified *Allen* "dynamite" charge; however, in *United States v. Rey*, 811 F.2d 1453 (11th Cir. 1987), a panel of that Court severely criticized the use of the dynamite charge, strongly suggesting that the issue was ripe for *in banc* review. 811 F.2d at 1460. This charge has not been reviewed *in banc* despite the panel's suggestion in *Rey*.

Importantly, there are vast differences between the circuits as to the use of a "dynamite" charge. As noted in *Rey*, three federal circuits have prohibited *Allen* charges, four other federal circuits have sharply curtailed their use, and, at least eighteen states have prohibited *Allen* charges. *Rey*, 811 F.2d at 1458.

Action by this Court is necessary to bar use of the *Allen* charges in the Eleventh Circuit. The surrounding context in which the charge was used in this case rendered it coercive beyond acceptability.

The district court enhanced the coercive atmosphere by changing the rules concerning the jury's control of the deliberation

schedule. The district court initially announced that he "always" left control of the schedule to the jury. R9-1294. When the jury announced a deadlock, he threatened prolonged deliberations on Friday, R10-1438, thus, threatening the jury members' weekend activities. While this Court has not ruled late Friday verdicts to be inherently the product of coercion, in the context of the particular facts of Don May's case, given also the fact of the split verdict, the Friday evening verdict strongly evidences coercion.

Leaving the jury further adrift, the district court refused instructions specifically requested by Don May's counsel, R11-1444, to inform the jury not to surrender to the will of the majority and to inform the jury of its right to return and announce an inability to reach a verdict.

The issue of the *Allen* charge invokes both the supervisory powers of this Court and the Sixth Amendment right to trial by jury.

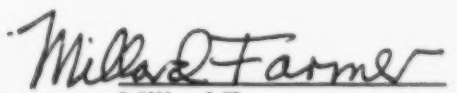
The jury in Don May's case worked long and diligently. They were presented with strong evidence of Don May's innocence. Under the totality of the facts of this case, the *Allen* charge was coercive, rendering the resultant verdict unreliable.

CONCLUSION

Certainly, Donald May is not the "high level" public official described in the guidelines of the Justice Department; certainly, the money he agreed to accept for his consulting fee was not a "significant" amount of money; certainly, the jury instruction given in his case was not the type of instruction envisioned by the author of *Evans*. Donald May fits only one characterization of a Hobbs Act defendant – political outsider.

This Court should grant this petition for writ of certiorari.

Respectfully submitted,



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COUNSEL FOR
PETITIONER

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-9026

D.C. Docket No. 3:90-CR-6-GET

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD O. MAY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(November 16, 1992)

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
vs.	)	
	)	NO. 3:90-CR-06
DONALD O. MAY	)	
	)	

TRANSCRIPT OF PROCEEDINGS BEFORE THE HON. G. ERNEST TIDWELL, JR., UNITED STATES DISTRICT JUDGE, COMMENCING ON JULY 17, 1991, AT NEWNAN, GEORGIA.

VOLUME 10

APPEARANCES OF COUNSEL:

FOR THE GOVERNMENT: WILLIAM MCKINNON

FOR THE DEFENDANT: MILLARD FARMER
JOSEPH NURSEY

SAMUEL N. BALDWIN

[WHEREUPON, THE JURY RETURNED TO THE COURTROOM.]

THE COURT: All right, members of the jury, it is now my duty to instruct you on the rules of law that you must follow and that you must apply in deciding this case. When I have finished with these instructions, you will go to the jury room and begin your discussions, what we call your deliberations or the jury deliberations. It will be your duty to decide whether the government has proven beyond a reasonable doubt the specific facts necessary to find the defendant guilty of the crimes charged in the indictment.

You must make your decision only on the basis of the testimony and the other evidence presented here during the trial, and you must not be influenced in any way by either sympathy or prejudice for or against the defendant or the government. You must follow the law as I explain it to you whether you agree with that law or not, and you must follow all of my instructions as a whole. You may not single out or disregard any of the Court's instructions on the law.

Now, ladies and gentlemen, the indictment or formal charge against any defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or to produce any evidence at all. The Government has the burden of proving a

defendant guilty beyond a reasonable doubt, and if it fails to do so you must find the defendant not guilty.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proven beyond all possible doubt. It is reasonable doubt concerning the defendant's guilt. A reasonable doubt is a real doubt based upon reason and common sense after a careful and impartial consideration of all of the evidence in the case.

Proof beyond a reasonable doubt therefore is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the defendant has been proven guilty beyond a reasonable doubt, say so; if you are not convinced, say so.

Now as I have stated earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted into the record. Remember that anything the lawyers say is not evidence in the case, and it is your own recollection and your own interpretation of the evidence that controls. What the lawyers say is not binding upon you.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make. You should not be concerned about whether the evidence is direct or circumstantial. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating that the defendant is either guilty or not guilty, and the law makes no distinction between the weight you may give to either direct or circumstantial evidence .

Now, in saying that you must consider all of the evidence I do not mean that you must accept all of the evidence as either

true or accurate. You should decide whether you believe what each witness had to say and how important that testimony was. In making that decision you may believe or disbelieve any witness in whole or in part. Also the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

Now, in deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions. Did the person impress you as one who was telling the truth. Did he or she have any particular reason not to tell the truth. Did he or she have a personal interest in the outcome of the case. Did the witness seem to have a good memory. Did the witness have the opportunity and the ability to observe accurately the things he or she testified about. Did he or she appear to understand the questions clearly and answer them directly. Did the witness' testimony differ from the testimony of other witnesses.

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something or failed to say or do something which was different from the testimony he or she gave before you during the trial. You should keep in mind of course that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood, and that may depend upon whether it has to do with an important fact or with only an unimportant detail.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field, one who is called an expert witness, is permitted to state his or her opinion concerning those technical matters. Merely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is upon to you to decide whether to rely upon it.

Members of the jury, you will note that the indictment charges that the offense was committed on or about a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Now, members of the jury, the word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally. And not because of mistake or accident. The word "wilfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids, that is, with bad purpose either to disobey or disregard the law.

Now, members of the jury, a separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the charges or as to one of the offenses charged would not affect your verdict as to any other offense charged. I caution you, ladies and gentlemen, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for those specific offenses alleged in the indictment.

Also the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted, the matter of punishment is for the judge or the Court to determine.

Now, ladies and gentlemen, evidence has been offered of the defendant's good character, and such evidence may give rise to a reasonable doubt. So where a defendant has offered testimony that he is an honest and law abiding citizen, the jury should consider that testimony along with all the other evidence in deciding whether the government has proven beyond a reasonable doubt that the defendant wilfully committed the crime charged.

Now, ladies and gentlemen of the jury, during the trial you heard some tape recordings, and in connection with those tape recordings I admitted the transcript of some of the-- a transcript of those tape recordings for the limited and secondary purpose of aiding you in following the content of the conversation as you listened to the tape recordings, and also to aid you in identifying the speakers. However, you should understand and you are hereby instructed that whether the transcripts correctly or incorrectly reflected the content of the conversation or the identity of the speakers is entirely for you to determine based upon your own evaluation of the testimony you have heard concerning the transcripts, and from your own examination of the transcripts in relation to your own hearing of the tape recordings itself, as the tape recordings itself are the primary evidence of their own content. And if you should determine that the transcript -- or the transcript was in any respect incorrect or unreliable, you should disregard it to that extent.

Now, ladies and gentlemen of the jury, during the course of the trial some of you have been taking notes, and in that connection I charge you that these notes are not evidence and it is

your own recollection of the testimony and not your notes which must control your deliberations.

Ladies and gentlemen of the jury, Title 18 of the United States Code, Section 1951(A), referred to as the Hobbs Act, is a law passed by the United States Congress, and makes it a federal crime for anyone to in any way or degree obstruct, delay, or affect interstate commerce by extortion or attempted extortion.

The defendant can be found guilty of violating the Hobbs Act only if all of the following elements are proven beyond a reasonable doubt. One, that the defendant induced or attempted to induce the person or persons described in the indictment to part with property. Two. That the defendant did so knowingly and wilfully by means of extortion, as I will later define that term; and, three, that the extortion or attempted extortion delayed, interrupted, or adversely affected or threatened to delay, interrupt, or adversely affect interstate commerce in any way or degree.

Now, extortion is the obtaining of property from someone else with their consent, but whose consent is brought about by either the wrongful use of fear or under color of official right. Now, only one of these two stated alternatives need be proven in order to find the defendant guilty. In this context, the word "wrongful" means to obtain property unfairly and unjustly by one having no lawful right or claim to it.

Now, in considering extortion by the wrongful use of fear, the term "fear" means a state of anxious concern, alarm, or apprehension of harm, and it includes fear of economic loss, as well as fear of physical violence or harm. Extortion under color of official right is the wrongful taking by a public official of money not due to him or his office. Extortion under color of official right does not require proof of specific acts by the public official demonstrating force, threat, or the use of fear, so long as the

victim consented to giving over the money or property because of the office or position held by the official.

In other words, the wrongful use of otherwise valid official power may convert lawful action into unlawful extortion. It is also not necessary to prove that the defendant actually had the power to effect or to secure the official action desired by the victim. All that is required is a reasonable belief by the victim that the defendant possessed the power and would use it.

Furthermore, passive acceptance of property by a public official is sufficient to form the basis of extortion under color of official right if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. That is, the official need not take any specific action to induce the offering of the benefit.

The essence of the crime of extortion by means of fear of economic loss is the defendant's exploitation of that fear and not its inducement. Therefore, it is not necessary that the defendant created the fear in the mind of the victim. It is also not a defense to extortion by means of fear of economic loss that the fear in the mind of the victim was already present as a result of the victim's own past experiences, or that the fear was created by someone other than the defendant.

It is sufficient that the government shows that the circumstances surrounding the act or the alleged act of extortion renders the victim's fear reasonable. The essential elements necessary to establish extortion by means of economic loss are as follows. One, the defendant received or attempted to receive property of the victim without any lawful claim to it, and the victim made this payment out of fear of economic loss.

Two. The victim's fear of economic loss was reasonable under the circumstances. Three, the defendant was aware of the victim's fear; and four, the defendant thereafter exploited or played

upon the victim's reasonable fear in order to induce the victim to part with the property.

The exploitation of the victim's fearful state of mind may be accomplished by subtle means, including but not limited to implied or veiled threats; that is, the exploitation need not be accomplished through direct or explicit threat or threats made by the defendant.

Now, in order to establish a violation of the Hobbs Act due to extortion or attempted extortion under color of official right, it is not necessary that the Government prove the defendant as a public official affirmatively demanded or solicited a payment in exchange for some specific exercise of the power of his position as a member of the Spaulding County Planning Commission or as a member of the Spaulding County Board of Appeals.

All that must be established is that the defendant accepted or agreed to accept a payment to which he was not entitled, and that this payment was motivated by the victim's expectation of the defendant's exercise of his power as a public official, and that the defendant was aware that the payment or the intended payment was to be made in exchange for the performance of his official duties.

Now, ladies and gentlemen, the indictment charges the defendant with violating the Hobbs Act by extortion through the wrongful use of actual and threatened fear of economic loss, and under color of official right. I instruct you that it is not necessary for you to conclude that the defendant employed both methods or means. If you find beyond a reasonable doubt that the defendant utilized either means, that is, that he obtained the monies by either the wrongful use of actual or threatened fear, or under the color of official right, such a finding would be sufficient for you to conclude that the defendant did in fact commit the crimes charged.

In this regard, however, your verdict must be unanimous as to which of the ways that the defendant committed the crime.

Therefore, if some of you feel that the evidence was only sufficient as to one of the ways of committing the crime and some of you feel that the evidence was only sufficient as to the other way of committing the crime, you could not return a verdict of guilty because your verdict would not be unanimous.

If you all agree that the crime of extortion was committed, you must also all agree as to the way or ways that the crime was committed before you could find the defendant guilty.

Now, ladies and gentlemen of the jury, to obstruct, delay, or affect interstate commerce it is not necessary to prove that the defendant specifically intended to interfere with interstate commerce; however, it is necessary that the Government prove that the natural consequences of the acts alleged in the indictment would threaten to delay, interrupt, or adversely affect the flow of commerce or business activities between two or more states.

Now, ladies and gentlemen, it is the duty of the Court and not the jury to determine whether the Government's evidence, if you believe it beyond a reasonable doubt, established that the conduct of the defendant threatened to affect interstate commerce so as to bring the activities of the defendant within the scope of the Hobbs Act and sustain federal criminal jurisdiction.

The Government has presented evidence that at the time the payments were made to Mr. May, Mr. Landrum and Mr. Lawhorn -- were made to Mr. May by Mr. Landrum and Mr. Lawhorn, that Mr. Landrum and Mr. Lawhorn were engaged in business affairs and transactions that involved interstate commerce. The court has found as a matter of law that the requirements of the Hobbs Act as to interstate commerce being affected would be met by the Government's evidence, if that evidence is believed by you, beyond a reasonable doubt; that is, if it is believed by you, the jury, beyond a reasonable doubt.

Accordingly I charge you that if you are convinced beyond a reasonable doubt that the evidence about Mr. Landrum and Mr. Lawhorn's interstate business affairs is true, then as a matter of law you must find that the interstate commerce element of the corresponding offense charged in the indictment has been satisfied.

Now, ladies and gentlemen, the fact that if there had been no payment the defendant might lawfully and properly have taken the very same action is not a defense to a Hobbs Act violation. If a public official agrees to take or withhold official action for the purpose of inducing a person to part with property, such action could constitute extortion even though the public official was already duty bound to take or withhold the action in question.

Now, ladies and gentlemen, a public official within the context of the Hobbs Act includes an officer or employee of the Government, be it federal, state, county, or city government, in any official function under or by authority of any branch or agency of that government. The term includes a person who has been elected or appointed to serve as a public official.

In that connection, I charge you that a duly appointed member of the Spaulding County Board of Zoning Appeals and/or the Spaulding County Planning Commission, is a public official within the meaning of the law.

Now, ladies and gentlemen of the jury, in addition to all the other legal requirements that must be proven before you could find the defendant guilty of the criminal conduct charged in Count 1 of the indictment, you must be convinced beyond a reasonable doubt that some substantial portion of the $3500.000 received by the defendant from Landrum and Morris during April and May of 1990 was paid by Landrum and Morris to the defendant for the purpose of inducing defendant's favorable vote as a member of the Spaulding Board of Zoning Appeals on Landrum and Morris' pending application before the Spaulding County Board of Zoning

Appeals for an extension of the zoning variance on the Highway 92 property; and that the defendant received the payment from Landrum and Morris knowing the reason it was paid to him was for the purpose of influencing his favorable vote on the variance extension.

Now, ladies and gentlemen of the jury, in addition to all the other legal requirements it must be proven, before you could find the defendant guilty of the criminal conduct charged in Count 2 of the indictment, you must be convinced beyond a reasonable doubt that some substantial portion of the $6500.00 Lawhorn agreed to pay the defendant was to be paid by Lawhorn to the defendant for the purpose of influencing defendant's favorable action as a member of the Spaulding County Planning Commission on Lawhorn's application for approval of the Cherokee Rose pre-development site plan, and that the defendant knew that a substantial portion of the $6500.00 payment by Lawhorn was to be paid to him for the purpose of influencing his favorable official action or conduct on the Cherokee Rose pre-development site plan application.

Now, ladies and gentlemen of the jury, any payment or promises of payment or solicitation of property or payment by or to the defendant for work or services he did or promised to do that was for some purpose or for some reason other than influencing or seeking to influence his official conduct could and would not be violation of the Hobbs Act.

Now, ladies and gentlemen of the jury, again in order to convict the defendant the Government must prove all of the essential legal elements of the offense involved beyond a reasonable doubt.

Now, ladies and gentlemen, any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, in order to return a verdict you must all agree

thereto. Your deliberations will be secret and you will never have to explain your verdict to anyone.

Now, it is your duty as jurors to discuss this case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to reexamine your own opinion and to change your mind if you become convinced that you were wrong; but do not give up your honest belief solely because the others think differently or merely to get the case over with. Remember that in a very real way, you are the judges, the judges of the facts, and your only interest is to seek the truth from the evidence in the case.

Now, ladies and gentlemen of the jury, when you go to the jury room you should first select one of your number to act as foreperson. The foreperson will preside over your deliberations and will speak for you here in court. Now, I have prepared for your use a form verdict and you should use this form verdict in preparing your verdict. The form verdict reads -- it's styled in this case, verdict, we the jury find the defendant Donald O. May as to Count 1, blank; as to Count 2, blank; this blank day of July, 1991, blank place for the foreperson to sign, so say we all. Where I have used the word Count 1, blank , and Count 2, blank, you would insert your findings, either guilty or not guilty, as to each of those two counts.

Now, members of the jury, take the verdict form to the jury room and when you have reached unanimous agreement have your foreperson fill it in, date it, sign it, and return it to the courtroom.

Now, ladies and gentlemen, if you should desire to communicate with the Court at any time please write down your message or question, pass the note to the deputy marshal, who will

bring it to my attention, and I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally; but ladies and gentlemen of the jury, I want to caution you and emphasize to you that you should not reveal to me or anyone else how you may be divided numerically unless and until you have reached unanimous consent or a unanimous verdict, or unanimous consent as to your verdict.

Ladies and gentlemen of the jury, that concludes the charge of the Court. I'll ask all the jurors to retire to the jury room except Mrs. Mitchell and Mrs. Brock. I'll ask Mrs. Mitchell and Mrs. Brock to remain seated for the time being. The other jurors, don't commence your deliberations until the evidence has been delivered to you, and the deputy marshall tells you to do so. All the jurors except Mrs. Mitchell and Mrs. Brock may retire at this time.

[WHEREUPON, THE JURY RETIRED FROM THE COURTROOM.]

THE COURT: Mrs. Mitchell and Mrs. Brock, you were the two alternate jurors. The law only makes provision for the twelve regular jurors to retire. I am at this time going to conditionally excuse you, very conditionally. You will not have any further responsibility in this case unless one of the twelve jurors for some reason became incapacitated, got sick, or some unanticipated event of that kind. But if in fact some unanticipated event like that occurred, I would call one or both of you back to substitute for them. So I'm going to conditionally excuse you. You can return to your normal pursuits, but I would ask that you not discuss the case, not have anything to do about the case. Keep an absolutely open mind, not do anything further about the case, don't discuss it, don't let anybody discuss it with you. I'm going

to ask you, if you will, just to step outside and have a seat in the hallway for just a moment.

In about five or ten minutes Mrs. Murphy will come out there and if you will please give her some information about how she can get in touch with you in the next day or two, if we need to get in touch with you. After she gets that information she will excuse you and if you don't hear from us by say early afternoon Friday, you can assume that we won't need you..

Thank you.

[WHEREUPON, THE JURORS LEFT THE COURTROOM.]

* * *

THE COURT: Okay. You keep the grand jury in there incamera. We will await the verdict of the jury, gentlemen.

[WHEREUPON, COURT WAS IN RECESS]

THE COURT: All right. Gentlemen, I received the following communication. "Judge Tidwell, we would like a copy of the judge's charges from the explanation of Title 18, Section 1951, to the conclusion of the charge." Nancy, I guess it is, G. Tilley, dated and signed.

I don't have a copy of the charge available. The only way I know to respond to that is to offer to reread that part of the charge to them.

* * *

[WHEREUPON, THE JURY RETURNED TO THE COURTROOM.]

THE COURT: All right. Ladies and gentlemen of the jury, I have received your communication and I will attempt to repeat it slower, and if it's not slow enough I'll repeat it again or as many times as I need to, but before I do that I need to inform you that although I am only going to repeat a part of this charge, you should understand that you cannot take what I am repeating out of context with the entire charge, and you should not ignore in any respect or overlook any other aspect of the charge. The charge goes to you as an entire charge and should be considered by you as the entire charge of the Court.

Title 18 of the Untied States Code, Section 1951(a), referred to as the Hobbs Act, is a law passed by the United States Congress and makes it a federal crime for anyone to in any way or degree obstruct, delay, or affect interstate commerce by extortion or attempted extortion.

The defendant can be found guilty of violating the Hobbs Act only if all of the following elements are proven beyond a reasonable doubt. First, that the defendant induced or attempted to induce the person or persons described in the indictment to part with property. Two, that the defendant did so knowingly and wilfully by means of extortion, as I will later define that term, and, three, that the extortion or attempted extortion delayed, interrupted, or adversely affected or threatened to delay, interrupt, or adversely affect interstate commerce in any way or degree.

Now, extortion is the obtaining of property from someone else with their consent but whose consent is brought about by either the wrongful use of fear or under color of official right. Only one of these two stated alternatives need be proven in order to find the defendant guilty. In this context, the word "wrongful" means to obtain property unfairly and unjustly by one having no lawful right or claim to it.

Now, in considering extortion by the wrongful use of fear the term "fear" means a state of anxious concern, alarm, or apprehension of harm, and it includes fear of economic loss as well as fear of physical violence or harm. Extortion under color of official right is the wrongful taking by a public official of money not due to him or his office. Extortion under color of official right does not require proof of specific acts by the public official demonstrating force, threat, or the use of fear, so long as the victim consented to giving over the money or property because of the office or position held by the official.

In other words, the wrongful use of otherwise valid official power may convert lawful action into unlawful extortion. It is also not necessary to prove that the defendant actually had the power to effect or to secure the official action described by the victim. All that is required is a reasonable belief by the victim that the defendant possessed the power and would use it.

Furthermore, passive acceptance of property by a public official is sufficient to form the basis of extortion under color of official right if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power; that is, the official need not take any specific action to induce the offering of the benefit.

The essence of the crime of extortion by means of fear of economic loss is the defendant's exploitation of that fear and not its inducement. Therefore, it is not necessary that the defendant created the fear in the mind of the victim. It is also not a defense to extortion by fear of economic loss that the fear in the mind of the victim was already present as a result of the victim's own past experiences, or that the fear was created by someone other than the defendant. It is sufficient that the government shows that the circumstances surrounding the act of extortion renders the victim's fear reasonable.

The essential elements necessary to establish extortion by means of fear of economic loss are as follows. One, that the defendant received or attempted to receive property of the victim without any lawful claim to it, and the victim made this payment out of fear of economic loss. Two. The victim's fear of economic loss was reasonable under the circumstances. Three, the defendant was aware of the victim's rear; and, four, the defendant thereafter exploited or played upon the victim's reasonable fear in order to induce the victim to part with the property.

The exploitation of the victim's fearful state of mind may be accompanied by subtle means -- maybe accomplished let me start over. The exploitation of the victim's fearful state of mind may be accomplished by subtle means, including but not limited to implied or veiled threats; that is, the exploitation need not be accomplished through direct or explicit threat or threats made by the defendant.

To establish a violation of the Hobbs Act due to extortion or attempted extortion under color of official right, it is not necessary that the Government prove that the defendant, as a public official, affirmatively demanded or solicited a payment in exchange for some specific exercise of the power of his position as a member of the Spaulding County Planning Commission, and/or as a member of the Spaulding County Board of Appeals.

All that must be established is that the defendant accepted or agreed to accept a payment to which he was not entitled, and that this payment was motivated by the victim's expectation of the defendant's exercise of his power as a public official, and that the defendant was aware that the payment or the intended payment was to be made in exchange for the performance of his official duties.

Now, the indictment charges the defendant with violating the Hobbs Act by extortion through the wrongful use of actual and threatened fear of economic loss, and under color of official right.

I instruct you that it is not necessary for you to conclude that the defendant employed both methods or means. If you find beyond a reasonable doubt that the defendant utilized either means, that is, that he obtained the monies by either the wrongful use of actual or threatened fear or under the color of official right, such a finding would be sufficient for you to conclude that the defendant did in fact commit the crimes charged.

In this regard, however, your verdict must be unanimous as to which of the ways that the defendant committed the crime. Therefore, if some of you feel that the evidence was only sufficient as to one of the ways of committing the crime and some of you feel that the evidence was only sufficient as to the other way of committing the crime, you could not return a verdict of guilty because your verdict would not be unanimous.

If you all agree that the crime of extortion was committed, you must also all agree as to the way or ways that the crime was committed before you find the defendant guilty.

Now, to obstruct, delay, or affect interstate commerce, it is not necessary to prove that the defendant specifically intended to interfere with interstate commerce. However, it is necessary that the Government prove that the natural consequences of the acts alleged in the indictment would threaten to delay, interrupt, or adversely affect the flow of commerce or business activities between two or more states.

Now, it is the duty of the Court and not for the jury to determine whether the Government's evidence, if you believe it beyond a reasonable doubt, established that the conduct of the defendant threatened to affect interstate commerce so as to bring the activities of the defendant within the scope of the Hobbs Act and sustain federal criminal jurisdiction.

The Government has presented evidence that at the time the payments were made to Mr. May, Mr. Landrum and Mr. Lawhorn

were engaged in business affairs and transactions that involved interstate commerce. The court has found as a matter of law that the requirements of the Hobbs Act as to interstate commerce being affected would be met by the Government's evidence, if that evidence is believed by you the jury beyond a reasonable doubt.

Accordingly I charge you that if you are convinced beyond a reasonable doubt that the evidence about Mr. Landrum's and/or Mr. Mr. Lawhorn's interstate business affairs is true, then as a matter of law you must find that the interstate commerce element of that corresponding offense charged in the indictment has been sustained.

The fact that if there had been no payment to the defendant the defendant might lawfully and properly have taken the very same action is not a defense to a Hobbs Act violation. If a public official agrees to take or withhold official action for the purpose of inducing a person to part with property, such action could constitute extortion even though the public official was already duty bound to take or to withhold the action in question.

A public official within the context of the Hobbs Act includes an officer or employee of the Government, be it federal, state, county, or city government, in any official function under or by authority of any branch or agency of that Government. The term includes a person who has been elected or appointed to serve as a public official.

A duly appointed member of the Spaulding Zoning Appeals and/or the Spaulding County Planning Commission is a public official within the meaning of the law.

Now, in addition to all the other legal requirements that must be proven before you could find the defendant guilty of the criminal conduct charged in Count 2 of the indictment, you must be convinced beyond a reasonable doubt that some substantial portion of the $6500.00 that Lawhorn agreed to pay the defendant

was to be paid by Lawhorn for the purpose of influencing defendant's favorable action as a member of the Spaulding County Planning Commission on Lawhorn's application for approval of the Cherokee Rose pre-development site plan, and that the defendant knew that a substantial portion of the $6500.00 payment by Lawhorn was to be paid to him for the purpose of influencing his favorable official action or conduct on the Cherokee Rose pre-development site plan application.

Now, ladies and gentlemen of the jury, any payments or promises of payments or solicitation of property by or to the defendant for work or services he did or promised to do that was for some purpose or reason other than influencing or seeking to influence his official conduct could and would not be a violation of the Hobbs Act. Again, in order to convict the defendant the Government must prove all of the essential legal elements of the offense involved beyond a reasonable doubt.

Now, ladies and gentlemen of the jury, again I repeat what I have recharged is only part of the charge. It must be considered by you -- the charge must be considered by you in its entirety. I think that's in response to your question. If it is not, if you will inform me I will attempt to comply with your request.

Anything further that I can do at this time? If not, you may retire to recommence your deliberations.

[WHEREUPON, THE JURY RETIRED FROM THE COURTROOM.]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
vs.	)	
	)	NO. 3:90-CR-06
DONALD O. MAY	)	
	)	

TRANSCRIPT OF PROCEEDINGS BEFORE THE HON. G. ERNEST TIDWELL, JR., UNITED STATES DISTRICT JUDGE, COMMENCING ON JULY 18, 1991, AT NEWNAN, GEORGIA.

VOLUME 11

APPEARANCES OF COUNSEL:

FOR THE GOVERNMENT: WILLIAM MCKINNON

FOR THE DEFENDANT: MILLARD FARMER
JOSEPH NURSEY

SAMUEL N. BALDWIN
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURTHOUSE
ATLANTA, GEORGIA
[404] 331-3726

[NEWNAN, COWETA COUNTY, GEORGIA, JULY 18, 1991 IN OPEN COURT.]

THE COURT: All right, gentlemen. Have you shown this to the lawyers?

THE CLERK: No, I have not.

THE COURT: It says, "Judge Tidwell, the members of the jury are still not clear about the entire charge given us. Please repeat the entire address from yesterday slowly. Nancy Tilley."

Bring in the jury.

[WHEREUPON, THE JURY RETURNED TO THE COURTROOM.]

THE COURT: All right. Ladies and gentlemen of the jury, I received your latest communication but I want to make sure I understand. You want me to repeat the entire charge or repeat what I repeated?

THE FOREPERSON: The entire charge.

THE COURT: The entire charge. Sure.

Ladies and gentlemen of the jury, it is my duty to instruct you on the rules of the law that you must follow and that you must apply in deciding this case. It will be your duty to decide under these rules of instructions whether the Government has proven beyond a reasonable doubt the specific facts necessary to find the defendant guilty of the crime charged in the indictment.

You must make your decision only on the basis of the testimony and the other evidence presented here during this trial, and you must not be influenced in any way by either sympathy or prejudice for or against the defendant or the Government. You must also follow the law as I explain it to you whether you agree with that law or not, and you must follow all of the instructions of the Court as a whole. You may not single out or disregard any of the Court's instructions on the law.

The indictment or formal charge against any defendant is not evidence of guilt. Indeed the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or to produce any evidence at all. The Government has the burden of proving a defendant guilty beyond a reasonable doubt, and if it fails to do so you must find the defendant not guilty.

Thus while the Government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proven beyond all possible doubt. It is only required that the Government's proof exclude any reasonable doubt concerning the defendant's guilt.

A reasonable doubt is a real doubt based upon reason and common sense, after careful and impartial consideration of all of the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and to act upon it without hesitation in the most important of your own affairs. If you are convinced that the defendant has been proven guilty beyond a reasonable doubt, say so; if you are not convinced, say so.

Now, as I have stated earlier you must must [sic] consider only the evidence that I have admitted in this case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted into the record. Remember that anything the lawyers say

is not evidence in the case. It is your recollection and your own interpretation of the evidence that controls. What the lawyers say is not binding upon you.

Now, in considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make, and you should not be concerned about whether the evidence is direct or circumstantial. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating that the defendant is either guilty or not guilty, and the law makes no distinction between the weight you may give either to direct or circumstantial evidence.

No, in saying that you must consider all of the evidence I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say and how important that testimony was. In making that decision, you may believe or disbelieve any witness in whole or in part.

Also the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary. In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions. Did the person impress you as one who was telling the truth. Did he or she have any particular reason not to tell the truth. Did he or she have a personal interest in the outcome of the case. Did the witness seem to have a good memory. Did the witness have the opportunity and the ability to observe accurately the things he or she testified about. Did he or she appear to understand the questions clearly and answer them directly. Did the witness' testimony differ from the testimony of other witnesses.

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something or failed to say or do something which was different from the testimony he or she gave before you during the trial. You should keep in mind of course that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or to remember other things inaccurately.

So if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood, and that may depend upon whether it has to do with an important fact or with only an unimportant detail.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field, one who is called an expert witness, is permitted to state his or her opinion concerning those technical matters. Merely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Now, ladies and gentlemen of the jury, you will note that the indictment charges that the offense was committed on or about a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, and not because of mistake or

accident. The word "wilfully," as that term has been use it [sic] from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids, that is, with bad purpose either to disobey or disregard the law.

Now, ladies and gentlemen, a separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any other offense charged. I caution you that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty, and the defendant is on trial only for those specific offenses alleged in the indictment.

Also the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Now, evidence has been offered of the defendant's good character, and such evidence may give rise to a reasonable doubt. So where a defendant has offered testimony that he is an honest and law-abiding citizen the jury should consider that testimony along with all the other evidence in deciding whether the Government has proven beyond a reasonable doubt that the defendant wilfully committed the crime charged.

Now, ladies and gentlemen of the jury, as you will recall, you have heard various tape recordings, videotape and audio tape recordings, and in connection with some of those tape recordings I have admitted the transcript of those recordings, and those transcripts were admitted for the limited and the secondary purpose of aiding you in following the content of the conversation as you listened to the tape recording, and also to aid you in identifying the

speakers. However, you are instructed that whether the transcript correctly or incorrectly reflected the content of the conversations or the identity of the speakers is entirely for you to determine based upon your own evaluation of the testimony you have heard concerning the preparation of the transcripts, and from your own examination of the transcripts in relation to your hearing of the tape recordings themselves. The tape recordings themselves being the primary evidence of their own content. If you should determine that the transcripts in any respect are incorrect or unreliable, you should disregard them to that extent.

Now, during the course of the trial some of you were taking notes. I charge you that insofar as those notes are concerned your notes are not evidence, and it is your own recollection of the testimony and not your notes which must control during your deliberations.

Now, ladies and gentlemen of the jury, Title 18 of the United States Code, Section 1951(A), referred to as the Hobbs Act, is a law passed by the United States Congress, and makes it a federal crime for anyone to in any way or degree obstruct, delay, or affect interstate commerce by extortion or attempted extortion. The defendant can be found guilty of violating the Hobbs Act only if all of the following elements are proven beyond a reasonable doubt.

One. That the defendant induced or attempted to induce the person or persons described in the indictment to part with property. Two. That the defendant did so knowingly and wilfully by means of extortion, as I will later define that term; and, three, that the extortion or attempted extortion delayed, interrupted, or adversely affected or threatened to delay, interrupt, or adversely affect interstate commerce in any way or degree.

Now, extortion is the obtaining of property from someone else with their consent but whose consent is brought about by

either the wrongful use of fear or under color of official right. Only one of these two stated alternatives need be proven in order to find the defendant guilty. In this context, the word "wrongful" means to obtain property unfairly and unjustly by one having no lawful right or claim to it.

Now, in considering extortion by the wrongful use of fear, the term "fear" means a state of anxious concern, alarm, or apprehension of harm, and it includes fear of economic loss as well as fear of physical violence or harm. Extortion under color of official right is the wrongful taking by a public official of money not due to him or his office. Extortion under color of official right does not require proof of specific acts by the public official demonstrating force, threat, or the use of fear so long as the victim consented to the giving over the money or property because of the office or position held by the official. In other words, the wrongful use of otherwise valid official power may convert lawful action into unlawful extortion.

It is also not necessary to prove that the defendant actually had the power to affect or to secure the official action desired by the victim. All that is required is a reasonable belief by the victim that the defendant possessed the power and would use it. Further passive acceptance of property by a public official is sufficient to form the basis of extortion under color of official right if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power; that is, the official need not take any specific action to induce the offering of the benefit.

Now, the essence of the crime of extortion by means of fear of economic loss is the defendant's exploitation of that fear and not its inducement. It is not necessary that the defendant created the fear in the mind of the victim. It is also not a defense to extortion by means of fear or economic loss that the fear in the

mind of the victim was already present as a result of the victim's own past experiences, or that the fear was created by someone other than the defendant. It is sufficient if the Government shows that the circumstances surrounding the act of extortion renders the victim's fear reasonable.

The essential elements necessary to establish extortion by means of fear of economic loss are as follows. One. The defendant received or attempted to receive property of the victim without any lawful claim to it, and the victim made this payment out of fear of economic loss. Two. The victim's fear of economic loss was reasonable under the circumstances. Three. The defendant was aware of the victim's fear; and, four, the defendant thereafter exploited or played upon the victim's reasonable fear in order to induce the victim to part with the property.

The exploitation of the victim's fearful state of mind may be accomplished by subtle means, including but not limited to implied or veiled threats; that is, the exploitation need not be accomplished through direct or explicit threat or threats made by the defendant.

Now, in order to establish a violation of the Hobbs Act due to extortion or attempted extortion under color of official right, it is not necessary that the Government prove the defendant as a public official affirmatively demanded or solicited a payment in exchange for some specific exercise of the power of his position as a member of the Spaulding County Planning Commission or as a member of the Spaulding County Board of Appeals. All that must be established is that the defendant accepted or agreed to accept a payment to which he was not entitled, and that this payment was motivated by the victim's expectation of the defendant's exercise of his power as a public official, and that the defendant was aware that the payment or the intended payment was to be made in exchange for the performance of his official duties.

Now, as I have mentioned before, the indictment charges the defendant was violating the Hobbs Acts by extortion through the wrongful use of actual and threatened fear of economic loss, and under color of official right. I instruct you that it is not necessary for you to conclude that the defendant employed both methods or both means. If you find beyond a reasonable doubt that the defendant utilized either means, that is, that he obtained the monies by either the wrongful use of actual or threatened fear or under the color of official right, such a finding would be sufficient for you to conclude that the defendant did in fact commit the crimes charged.

In this regard, however, your verdict must be unanimous as to which of the ways that the defendant committed the crimes. Therefore, if some of you feel that the evidence was only sufficient as to one of the ways of committing the crime, and some of you feel that the evidence was only sufficient as to the other way of committing the crime, you could not return a verdict of guilty because your verdict would not be unanimous. If you all agree that the crime of extortion was committed, you must also all agree as to the way or ways that the crime was committed before you can find the defendant guilty.

Now, to obstruct, delay, or affect interstate commerce, it is not necessary to prove that the defendant specifically intended to interfere with interstate commerce, however, it is necessary that the Government prove that the natural consequences of the acts alleged in the indictment would threaten to delay, interrupt, or adversely affect the flow of commerce or business activities between two or more stated.

Now, it is the duty of the Court and not the jury to determine whether the Government's evidence, if you believe it beyond a reasonable doubt, established that the conduct of the defendant threatened to affect interstate commerce so as to bring

the activities of the defendant within the scope of the Hobbs Act and sustain federal jurisdiction.

The Government has presented evidence that at the time the payments were made to Mr. May that Mr. Landrum and Mr. Lawhorn were engaged in business affairs and transactions that involved interstate commerce. The Court has found as a matter of law that the requirements of the Hobbs Act as to interstate commerce being affected would be met by the Government's evidence if that evidence is believed beyond a reasonable doubt by you, the jury.

Accordingly, I charge you that if you are convinced beyond a reasonable doubt that the evidence about Mr. Landrum's and Mr. Lawhorn's interstate business affairs is true, then as a matter of law you must find that the interstate commerce element of the corresponding offense charged in the indictment has been satisfied.

Now, ladies and gentlemen, the fact that if there had been no payment the defendant might lawfully and properly have taken the very same action is not a defense to a Hobbs Act violation. If a public official agrees to take or withhold official action for the purpose of inducing a person to part with property, such action could constitute extortion even though the public official was already duty bound to take or withhold the action in question.

Now, ladies and gentlemen of the jury, a public official within the context of the Hobbs Act includes an officer of employee of a government, be it federal, state, county, or city government, in any official function under or by authority of any branch or agency of that government. The term includes a person who has been elected or appointed to serve as a public official. A duly appointed member of the Spaulding County Board of Zoning Appeals and the Spaulding County Planning Commission is a public official within the meaning of the law.

Now, ladies and gentlemen of the jury, in addition to all the other legal requirements that must be proven before you could find the defendant guilty of the criminal conduct charged in Count 1 of the indictment, you must be convinced beyond a reasonable doubt that some substantial portion of the $3500.00 received by the defendant from Mr. Landrum -- from Landrum and Morris during April and May of 1990 was paid by Landrum and Morris to the defendant for the purpose of influencing defendant's favorable vote as a member of the Spaulding County Board of Zoning Appeals on Landrum and Morris' pending application before the Spaulding County Board of Zoning Appeals for an extension of the zoning variance on the Highway 92 property; and that the defendant received the payment from Landrum and Morris knowing the reason it was paid to him was for the purpose of influencing his favorable vote on the variance extension.

Now, ladies and gentlemen of the jury, in addition to all the other legal requirements that must be proven before you could find the defendant guilty of the criminal conduct charged in Count Two of the indictment, you must be convinced beyond a reasonable doubt that some substantial portion of the $6500.00 that Lawhorn agreed to pay the defendant was to be paid by Lawhorn to the defendant for the purpose of influencing defendant's favorable action as a member of the Spaulding County Planning Commission on Lawhorn's application for approval of the Cherokee Rose pre-development site plan; and that the defendant knew that a substantial portion of the $6500.00 payment by Lawhorn was to be paid to him for the purpose of influencing his favorable official action or conduct on the Cherokee Rose pre-development site plan application.

Now, members of the jury, any payments or promises of payments or solicitation of payments by or to the defendant for work or services he did or promised to do that was for some

purpose or reason other than influencing or seeking to influence his official conduct could and would not be violation of the Hobbs Act.

Again, in order to convict the defendant the Government must prove all of the essential elements of the offenses involved beyond a reasonable doubt.

Now, ladies and gentlemen of the jury, your verdict in the jury room, whether guilty or not guilty, must be unanimous. in other words, in order to return a legal or proper verdict you must all agree thereto. Your deliberations will be secret and you will never have to explain your verdict to anyone. Again, I emphasize and point out to you that your duty as jurors is to discuss the case with one another in an effort to reach agreement if you can do so; however, each of you must decide the case for yourself but only after full consideration of all of the evidence with the other members of the jury.

While you are discussing the case, do not hesitate to re-examine your own opinions and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with. Remember that in a very real sense and a very real way you are the judges, the judges of the facts, and your only interest is to seek the truth from the evidence in the case.

I indicated you should select a foreperson which I assume you have already done. I described the verdict and the fact that as to each count you should enter your findings, whether it be guilty or not guilty. Once you have reached a verdict, I would ask that the foreperson -- reached a unanimous agreement on your verdict, I ask the foreperson to fill it in , date it, sign it, return it to the courtroom. I indicated to you how you should communicate with the Court. And I cautioned you to be very, very diligent and very, very careful not to reveal to anyone how you may be divided

numerically unless and until you have reached unanimous agreement.

Now, that completes the recharge. Is there anything further that may be of assistance at this time?

THE FOREPERSON: If we need the transcripts may be get those?

THE COURT: I'm sorry, would you try that once --

THE FOREPERSON: If we needed the transcripts, can we have those?

THE COURT: Whatever you may want, if you would describe it specifically and I will undertake it and discuss it with the lawyers and advise you. I wouldn't be able to say one way or the other at this time.

THE FOREPERSON: That's all.

THE COURT: Thank you, ma'am. You may retire.

[WHEREUPON, THE JURY RETIRED FROM THE COURTROOM]

* * *

[WHEREUPON THE COURT WAS IN RECESS.]

THE COURT: Karen, did you show them the note? It's my intention to excuse them for the evening but I'm going to bring

them back at 9:00 tomorrow. See that will -- well. Okay. Bring in the jury.

THE MARSHAL: They want five minutes, Judge. I don't know --

THE COURT: "Judge Tidwell, if a unanimous decision cannot be reached on Count 1, can we come back tomorrow at 9:30." I don't know what that means. It may mean they have reached a verdict on --

MR. LANGLEY: On Count 2, yes.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
vs.	)	
	)	NO. 3:90-CR-06
DONALD O. MAY	)	
	)	

TRANSCRIPT OF PROCEEDINGS BEFORE THE HON. G. ERNEST TIDWELL, JR., UNITED STATES DISTRICT JUDGE, COMMENCING ON JULY 19, 1991, AT NEWNAN, GEORGIA.

VOLUME 12

APPEARANCES OF COUNSEL:

FOR THE GOVERNMENT: WILLIAM MCKINNON

FOR THE DEFENDANT: MILLARD FARMER.
JOSEPH NURSEY

SAMUEL N. BALDWIN
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURTHOUSE
ATLANTA, GEORGIA
[404] 331-3726

[NEWNAN, COWETA COUNTY, GEORGIA, JULY 19, 1991 IN OPEN COURT.]

THE COURT: Gentlemen, I have a message from the jury but first let me -- Karen said, Mr. Farmer, that you want to -- or Mr. Nursey, one of you all indicated -- is this what you wanted a copy of, any payments or promises of payments or solicitation of payments by or to the defendant for work or services? Is that the part of the charge you wanted?

MR. NURSEY: Yes.

THE COURT: All right. Well, if you promise not to make fun of my penmanship or spelling I'll get Miss Murphy to make you a copy of it.

MR. NURSEY: I'm in no position to make fun of anyone's penmanship.

THE COURT: Okay. Don't let it get away. I don't want to lose my part of the charge.

The message from the Jury, "Judge Tidwell. A unanimous decision cannot be reached on Count 1 or Count 2. Please advise us as to what to do," signed by Miss Tilley.

* * *

THE COURT: All right. I'll give the modified Allen charge. Bring in the jury.

[WHEREUPON, THE JURY RETURNED TO THE COURTROOM.]

THE COURT: All right. Ladies and gentlemen of the jury, I'm going to ask that you continue your deliberations in an effort to reach an agreement upon a verdict and dispose of this case, and I have a few additional comments that I would like for you to consider as you do so.

This is, as I am sure you realize, an important case. The trial has been expensive and time, effort, money, and emotional strain to both the defense and the prosecution. If you should fail to agree upon a verdict the case will be left open and may have to be tried again. Obviously another trial would only serve to increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.

Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced.

If a substantial majority of your number are in favor of conviction, those of you who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again and host thoughtfully whether you should accept the weight and the sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember that at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect

of the evidence, but after a full deliberation and consideration of the evidence in this case it is your duty to agree upon a verdict if you can do so.

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty. You may be as leisurely in your deliberations as the occasion may require, and you should take all the time which you may feel is necessary.

I now ask you to retire once again and continue your deliberations with these additional comments in mind, to be applied of course in conjunction with all the other instructions I have previously given you. You may retire again at this time.

[WHEREUPON, THE JURY RETIRED FROM THE COURTROOM.]

THE COURT: Gentlemen, I understand the jury has reached a verdict. Bring in the jury.

[WHEREUPON, THE JURY RETURNED TO THE COURTROOM.]

THE COURT: All right. Ladies and gentlemen of the jury, have you reached a unanimous verdict?

THE FOREPERSON: Yes.

THE COURT: Would you deliver the verdict form to the deputy marshal, please.

All right. Would you publish the verdict in open court, please.

THE CLERK; In the case of United States of America vs. Donald O. May, Criminal Indictment Number 3-90-CR-06, verdict. We the jury find the Defendant Donald O. May, as to Count 1, Not Guilty; As to Count 2, Guilty; this 19th day of July, 1991, Nancy G. Tilley, foreperson, so say we all.

THE COURT: Any Objection as to the form of the verdict?

MR. LANGLEY: No, your Honor.

MR. FARMER: Your Honor, we would ask that the jury be polled.

THE COURT: Poll the jury, please.

[WHEREUPON, THE JURY WAS POLLED WITH NO EXCEPTIONS TO THE VERDICT NOTED.]

THE COURT: Any objection as to the form of the poll?

MR. FARMER: To the form of the poll, no.

THE COURT: Any reason why the jury should not now be discharged?

[WHEREUPON, THE JURY WAS EXCUSED. CONCLUSION OF FOREGOING TRIAL.]

No. 92-1235

In the Supreme Court of the United States

OCTOBER TERM, 1992

DONALD O. MAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the *quid pro quo* element of extortion under color of official right.

2. Whether the district court's supplemental anti-deadlock instruction was impermissibly coercive.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is unpublished, but the judgment is noted at 979 F.2d 1538 (Table).

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1992. The petition for a writ of certiorari was filed on January 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to ten months' imprisonment, to be followed by three years of supervised release, and he was fined $20,000. The court of appeals affirmed without opinion. Pet. App. A1.

1. In January 1989, petitioner was appointed to the Spalding County Planning Commission, which considers zoning and land use matters for Spalding County, Georgia. A few months later, petitioner met with Gerald Lawhorn, who sought to develop a shooting club—a place where hunters could shoot at clay targets thrown from machines, along with a clubhouse, restaurant, and lodges—on property Lawhorn owned in Spalding County. They agreed that Lawhorn would pay petitioner $5,400 to draft a new zoning classification that would allow Spalding to develop the shooting club on his property. Without revealing to the Planning Commission either his relationship with Lawhorn or that he had personally drafted the proposed new zoning classification, petitioner voted both on the amendment adding the new classification and on Lawhorn's application to rezone his property. Gov't C.A. Br. 3-5.

Petitioner drafted into the new zoning classification a requirement for pre-development approval by the Planning Commission. In June 1990, after petitioner had become chairman of the Planning Commission, Lawhorn was informed that the County building inspector had refused, at petitioner's direction, to issue Lawhorn a building permit. After meeting with petitioner concerning this matter, Lawhorn's attorney reported to Lawhorn that he believed petitioner wanted to be paid to

approve Lawhorn's pre-development plans. Gov't C.A. Br. 6-8.

At a meeting in June 1990, petitioner told Lawhorn that the pre-development plans did not conform to the applicable code. Petitioner added that he would be chairman of the Planning Commission for another two and one-half years, and he said that Lawhorn would have to compensate him for the work he would need to do to make the plans acceptable. Lawhorn understood petitioner to be demanding a payoff in order to get the plans approved by the Planning Commission. Lawhorn informed the local district attorney and the FBI of petitioner's proposal. Gov't C.A. Br. 8.

At a secretly recorded meeting on July 19, 1990, Lawhorn agreed to pay petitioner $6,500 to get his pre-development plans approved by the Planning Commission within six weeks. Five days later, after Lawhorn paid petitioner $3,500 as a down payment, petitioner guaranteed Lawhorn that he would vote to approve the plans and that other members of the Planning Commission would vote with him. Following the meeting, government agents stopped petitioner and seized the payment. Gov't C.A. Br. 9-10.

2. Petitioner was charged with extorting money from Lawhorn both through the wrongful use of economic fear and under color of official right. With respect to the "under color of official right" theory of extortion, the district court instructed the jury in pertinent part as follows. Pet. App. B7-B9:[1]

[1] The court gave the same instructions in the form of a supplemental charge on two occasions, in response to inquiries from the jury. See Pet. App. B17-B18, B29-B30.

Extortion under color of official right is the wrongful taking by a public official of money not due to him or his office. Extortion under color of official right does not require proof of specific acts by the public official demonstrating force, threat, or the use of fear, so long as the victim consented to giving over the money or property because of the office or position held by the official.

* * * * *

Furthermore, passive acceptance of property by a public official is sufficient to form the basis of extortion under color of official right if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. That is, the official need not take any specific action to induce the offering of the benefit.

* * * * *

Now, in order to establish a violation of the Hobbs Act due to extortion or attempted extortion under color of official right, it is not necessary that the government prove the defendant as a public official affirmatively demanded or solicited a payment in exchange for some specific exercise of the power of his position as a member of the * * * Planning Commission * * *.

All that must be established is that the defendant accepted or agreed to accept a payment to which he was not entitled, and that this payment was motivated by the victim's expectation of the defendant's exercise of his power as a public official, and that the defendant was aware that the payment or the intended payment was to be made in exchange for the performance of his official duties.

3. During the third day of deliberations the jury announced that it was deadlocked. Pet. App. B38. In response to that announcement, the district court gave a modified *Allen* charge as follows, *id.* at B39-B40:

> Ladies and gentlemen of the jury, I'm going to ask that you continue your deliberations in an effort to reach an agreement upon a verdict and dispose of this case, and I have a few additional comments that I would like for you to consider as you do so.
>
> This is, as I am sure you realize, an important case. The trial has been expensive [in] time, effort, money, and emotional strain to both the defense and the prosecution. If you should fail to agree upon a verdict the case will be left open and may have to be tried again. Obviously another trial would only serve to increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.
>
> Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced.
>
> If a substantial majority of your number are in favor of conviction, those of you who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves

> again and [m]ost thoughtfully whether you should accept the weight and the sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt.
>
> Remember that at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence, but after a full deliberation and consideration of the evidence in this case it is your duty to agree upon a verdict if you can do so.
>
> You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty. You may be as leisurely in your deliberations as the occasion may require, and you should take all the time which you may feel is necessary.

At the end of the day on which the *Allen* charge was given, the jury reached a verdict, convicting petitioner on one extortion count and acquitting him on another. Pet. App. B41.

4. On appeal, petitioner contended that the district court erroneously instructed the jury on the *quid pro quo* element of extortion under color of official right. Petitioner also contended that the district court's modified *Allen* charge was impermissibly coercive. The court of appeals rejected those claims without opinion. Pet. App. A1.

ARGUMENT

1. Petitioner contends (Pet. 22-28) that the district court inadequately instructed the jury on the *quid pro quo* element of a Hobbs Act offense.

In *McCormick* v. *United States*, 111 S. Ct. 1807, 1816 (1991), which involved the receipt of campaign contributions, this Court held that "[t]he receipt of such contributions is * * * vulnerable under the [Hobbs] Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." In *Evans* v. *United States*, 112 S. Ct. 1881, 1889 (1992), which involved the receipt of a $7,000 payment that was not dressed up as a campaign contribution, the Court held that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[2]

In this case, petitioner cannot claim that the payment from Lawhorn was a campaign contribution, since petitioner was not an elected official. Accordingly, the applicable standard is that set forth in *Evans*, which the district court's instructions closely followed. The district court instructed the jury that, in order to be guilty of extortion under color of official right, it is sufficient that the public official accept money knowing that the

[2] The difference is in the specificity of the agreement. It would not be a violation of the Hobbs Act to make a campaign contribution to a legislator because the legislator was generally in favor of protectionist trade policy and the contributor's business would profit from protectionist legislation. But, under *McCormick*, it would be a violation of the Hobbs Act for a candidate to accept a campaign contribution that was expressly conditioned on the candidate's agreement to vote in a particular manner on a specific matter. It would also be a violation of the Hobbs Act, under *Evans*, for a legislator to accept a cash payoff (not a campaign contribution) from a person the legislator knows to have an interest in protectionist legislation, where the legislator knows that the payment was made in return for the legislator's official acts of support for protectionist trade policies, even if no specific act was promised in exchange for the payment.

payment was offered "in exchange for a specific requested exercise of his official power." Pet. App. B8. The court subsequently reiterated that the government must show that the payment was "made in exchange for the performance of his official duties." *Id.* at B9. Those instructions were plainly consistent with this Court's holding that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." 112 S. Ct. at 1889.

Petitioner does not contend that the above-quoted instructions were defective. Rather, he argues (Pet. 23) that they were fatally contradicted by the district court's instruction that "it is not necessary that the Government prove the defendant as a public official affirmatively demanded or solicited a payment in exchange for some specific exercise of the power of his position." Pet. App. B9. But particularly when read in conjunction with the instructions that preceded and followed it, the instruction on which petitioner focuses did not in any way contradict the court's instruction that the government was required to prove that Lawhorn's payment was made in exchange for petitioner's performance of an official act. Rather, the import of the challenged instruction was that, in order to violate the Hobbs Act, a public official need not induce ("affirmatively demand[] or solicit[]," in the words of the instruction) the payment. This Court held in *Evans* that the Hobbs Act does not require proof of inducement. 112 S. Ct. at 1883.[3]

[3] In 1984, in light of the then-existing uncertainty as to the scope of extortion under color of official right, the U.S. Attorneys' Manual advised prosecutors to use their discretion to limit prosecutions to cases involving high offices and large payoffs. U.S.Attorneys' Manual § 9-131.180 (1984). See *Evans*, 112 S. Ct. at 1904 (Thomas, J., dissenting). Petitioner argues (Pet. 24-27) that his prosecution violated that guideline. As an initial matter,

2. Petitioner contends (Pet. 28-33) that the district court erred by giving a modified *Allen* charge after the jury had informed the court that it had reached an impasse. The court of appeals properly rejected that claim.

In *Allen* v. *United States*, 164 U.S. 492, 501-502 (1896), this Court held that it was proper for a district court to give a supplemental instruction to a deadlocked jury encouraging the jurors to be open-minded and to reconsider their views if possible during their deliberations so that a verdict might be reached. More recently, in *Lowenfield* v. *Phelps*, 484 U.S. 231, 237 (1988), the Court reaffirmed the principles underlying the *Allen* decision. Those principles, the Court added, "apply even with greater force in a case such as this, where the charge given, in contrast to the so-called 'traditional *Allen* charge,' does not speak specifically to the minority jurors." 484 U.S. at 237-238.

The principal criticism of instructions patterned on the charge in *Allen* has been that such instructions direct only jurors in the minority to reexamine their views. See, *e.g.*, *United States* v. *Flannery*, 451 F.2d 880, 883 (1st Cir. 1971); *United States* v. *Thomas*, 449 F.2d 1177, 1183 (D.C. Cir. 1971); *United States* v. *Sawyers*, 423 F.2d 1335, 1342 (4th Cir. 1970); *United States* v. *Fioravanti*, 412 F.2d 407, 417 (3d Cir.), cert. denied, 396

however, petitioner failed to raise the issue below and thereby waived it. Second, internal Justice Department guidelines confer no rights on defendants; the Justice Department is the sole judge of whether a particular prosecution meets its own standards. See *United States* v. *Caceres*, 440 U.S. 741 (1979). Third, the amount of money involved in this case was substantial, and the office, although not a public position of high visibility, was an important position within the local county government. Finally, the guideline on which petitioner relies was repealed prior to petitioner's prosecution. See U.S. Attorneys' Manual § 9-131 (1988).

U.S. 837 (1969). Although the charge in this case suggested that if a substantial majority of jurors favored acquittal or conviction, the others should reconsider their views, it also stated that even if only a minority of jurors favored acquittal, the others should reconsider whether they should accept "the weight and the sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt." Pet. App. B39. Accordingly, the charge did not contain the much-criticized language suggesting that only the minority jurors should reexamine their views.

The charge in this case also did not suffer from the other principal defect attributed to some variations of the *Allen* charge—that they place undue emphasis on the prospect of a retrial and the costs that a retrial would impose on both parties. See, *e.g.*, *United States* v. *Rey*, 811 F.2d 1453, 1459 (11th Cir.), cert. denied, 484 U.S. 830 (1987); *United States* v. *Silvern*, 484 F.2d 879, 880-881 (7th Cir. 1973) (en banc); *United States* v. *Thomas*, 449 F.2d at 1183. In this case, the instruction stated only that if the jury did not reach a verdict, the case would be left open and might have to be tried again. The instruction thus informed the jury that a retrial was possible, not that it was inevitable. See *United States* v. *Harris*, 391 F.2d 348, 355-357 (6th Cir.), cert. denied, 393 U.S. 874 (1968). In addition, although the instruction referred to the expense of the trial and the expense of retrial, it did not dwell on those points. Compare *United States* v. *Angiulo*, 485 F.2d 37, 39 (1st Cir. 1973); *Peterson* v. *United States*, 213 F. 920, 924-926 (9th Cir. 1914).

Furthermore, the instruction at issue carefully balanced references to the consequences of a deadlocked jury with the admonition that the jurors should not feel compelled to surrender their honest convictions merely to reach a verdict, and it reminded the jury to return a verdict of not guilty if the evidence failed to establish the

defendant's guilt beyond a reasonable doubt. In sum, the instruction, viewed as a whole, was not impermissibly coercive. See *United States* v. *Nichols*, 820 F.2d 508, 511-512 (1st Cir. 1987).[4]

While there are differences in the anti-deadlock instructions approved by various courts of appeals, all the courts of appeals have upheld some form of supplemental jury charge advising jurors of their duty to deliberate and to attempt to reach a verdict. See *Lowenfield* v. *Phelps*, 484 U.S. at 238 n.1. There is no compelling need for a uniform anti-deadlock instruction for all circuits. Variety in the way courts remind juries of their duty to deliberate—like the variety in other jury instructions, such as the instruction on reasonable doubt—has been accepted practice in the federal system for years. See Committee on Pattern Jury Instructions, U.S. Fifth Circuit District Judges Ass'n, *Pattern Jury Instructions—Criminal Cases* 28 (1983). Unless and until this Court chooses to promulgate pattern jury instructions for the district courts throughout the nation, some variation among instructions, such as the anti-deadlock instruction, will be inevitable.

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[4] Petitioner faults the supplemental charge (Pet. 33) for failing to inform the jury of its right not to reach a verdict. However, the charge stated that it was the jury's duty to agree on a verdict only "if you can do so." Pet. App. B40. Petitioner also argues (Pet. 33) that the charge was coercive because it was given on a Friday. The timing of an anti-deadlock instruction, however, is within the discretion of the district court, see *United States* v. *Scruggs*, 583 F.2d 238, 241 (5th Cir. 1978), and we know of no authority for the proposition that such an instruction may not be given the day before the weekend.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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